



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/774,157	02/06/2004	Lukas Eiscermann	PC888.00/31132.123	7280
46333	7590	01/22/2007	EXAMINER	
HAYNES AND BOONE, LLP 901 MAIN ST SUITE 3100 DALLAS, TX 75202			PHILOGENE, PEDRO	
			ART UNIT	PAPER NUMBER
			3733	
SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE		
3 MONTHS	01/22/2007	PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/774,157	EISERMANN ET AL.	
Examiner	Art Unit		
Pedro Philogene	3733		

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### **Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 09 November 2006.

2a)  This action is **FINAL**.                    2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## **Disposition of Claims**

4)  Claim(s) 1-3 and 5-39 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) 23-25 and 27-29 is/are allowed.

6)  Claim(s) 1,2,5-8,10-13,16-22 and 30-39 is/are rejected.

7)  Claim(s) 3,9,14,15 is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All    b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3)  Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_

4)  Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_ .

5)  Notice of Informal Patent Application

6)  Other: \_\_\_\_\_

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-3,5-22,26,30-39 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Applicant fails to disclose first and second components that are triangular in shape. Although applicant is claiming first and second components that are triangular in shape, such limitations cannot be found in the specification. Applicant stated that such limitations could be found in paragraph 180 of the specification, however, a reading of paragraph 180 revealed no such limitations. Therefore, the claims contain subject matter that was not described in the specification.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-2,5-8,10-13,16-19,21,30-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huppert et al. (WO 03/039400).

With respect to claims 1, 22, Huppert et al disclose a prosthetic device for anterior-oblique insertion into an intervertebral space, comprising a first component (112) comprising a first articular surface and opposed first bearing surface, a first flange (2') extending from the bearing surface, the first flange being angled relative to the to the longitudinal and transverse axes of the first components; as best seen in FIG.4, a projection (13) extending from the first articular surface; and a second component (111) comprising a second articular surface and an opposed second bearing surface; a second flange (2) extending from the second bearing surface the second flange being angled relative to the longitudinal and transverse axes of the second component; as best seen in FIG.4, as set forth in page 2, lines 2, 6, 16-24, page 6, lines 9-13, page 7, lines 11-19, 29-31 a recess, as best seen in FIG.3, formed in the second articular surface, the recess being adapted to engage with the projection to provide for articulating motion between the first and second components.

With respect to claims 2, 5-8, 10-13, 16-19,21,39, Huppert et al disclose all the limitations; as set forth; for example, the flanges are adapted to aligned either parallel or offset relative to each other, as best seen in FIG.4, the flange including a gap and sharp portion; the projection being convex and the recess being concave as best seen in FIG.3, the flange adapted to be positioned within a preformed anterior-oblique opening, as best seen in FIG.4, the flange coated with a bone promoting substance; as set forth in page 8, line 16.

With respect to claims 30-38, the method steps, as set forth, would have been inherently carried out in the operation of the device, asset forth above.

With respect to the above claims, it is noted that Huppert et al did not teach of a device having a triangular shape and a flange parallel to either one of the sides; as claimed by applicant. However, this particular shape is nothing more than one of numerous configurations one of ordinary skill in the art would have found obvious for the purpose of providing mating surface in the prosthetic device of Huppert et al. in re Dailey, 149 USPQ 47 (CCPA 1976). As for the flange being parallel to any one of the sides, as can be seen in FIG.4 of Huppert et al the flange would have parallel to any one of the sides.

Claims 20,21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huppert et al. (WO 03/039400) in view of Marnay et al. (6,936,071).

With respect to claims 20,21, it is noted that Huppert et al did not teach of a first and second components including a pair of notches; as claimed by applicant. However, in a similar art, Marnay et al evidence the use of a first and second components including a pair of notches to introduce an implant into an intervertebral space.

Therefore, given the teaching of Manay et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to incorporate the a pair of notches in the device of Huppert et al, to introduce the device of Huppert et al into an intervertebral space.

#### ***Allowable Subject Matter***

Claims 3,9,14,15 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 23-29 are allowed.

***Response to Amendment***

Applicant's arguments filed 11/9/06 have been fully considered but they are not persuasive. Although applicant is arguing about the triangular shape and including such limitation to the independent claims, applicant fails to disclose such limitation. Applicant stated that such limitation is crucial to the invention by facilitating an oblique insertion approach from either the left or right side of the spine. However, applicant fails to include such limitation in the specification. Since applicant fails to disclose such limitation, the examiner fails compel to reiterate the previous rejections of the claims. The indentations of Huppert et al are attached to the walls of the vertebrae; therefore, they must be sharp enough to attach to be attached to the vertebrae.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

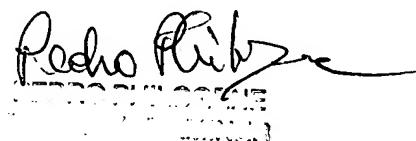
the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Pedro Philogene  
January 11, 2007

  
Pedro Philogene  
January 11, 2007